No. 18-15

IN THE

# Supreme Court of the United States

JAMES L. KISOR,

*Petitioner,*

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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# BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

## INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 55 national and international labor organizations with a total membership of over 12 million working men and women.[1]

The question presented in this case is "[w]hether the Court should overrule *Auer* [*v. Robbins*, 519 U.S. 452 (1997)] and [*Bowles v.*] *Seminole Rock* [*& Sand Co.*, 325 U.S. 410 (1945)]." The AFL-CIO has a strong interest in the proper resolution of this question because members of AFL-CIO-affiliated unions depend on a daily basis on the effective enforcement of workplace-related regulations by numerous federal agencies, including the Occupational Health and Safety Administration, the Mine Safety and Health Administration, and the Wage and Hour Division of the United States Department of Labor.

## STATEMENT

Petitioner James L. Kisor served on active duty in the Marine Corps from 1962 to 1966, including with the 2nd Battalion of the 7th Marines in the Vietnam War, during which time he saw combat in "Operation

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[1] Counsel for the petitioner and counsel for the respondent have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

Harvest Moon." *Kisor v. Shulkin*, 869 F.3d 1360, 1361 & n.1, 1362 (Fed. Cir. 2017). In December 1982, Kisor filed a claim for disability compensation benefits for post-traumatic stress disorder (PTSD) with the Department of Veterans Affairs (VA) Regional Office in Portland, Oregon. *Id.* at 1361. The Regional Office denied Kisor's benefits claim in May 1983 on the basis of a VA examiner's determination that he "suffered from 'a personality disorder as opposed to PTSD.'" *Ibid.* (quoting Addendum to PTSD review (J.A. 13)).

In June 2006, Kisor submitted a request to reopen his previously-denied claim. *Id.* at 1362. While his request was pending, Kisor submitted additional service department records concerning his participation in Operation Harvest Moon, records that the VA could have—but did not—obtain and review as part of its consideration of Kisor's original claim for benefits. *Id.* at 1362, 1364 n.5.

This time the Regional Office concluded that Kisor did have PTSD based on his service in Vietnam. *Id.* at 1362. Benefits were made effective June 5, 2006, the date he filed his request to reopen. *Ibid.*

Kisor appealed the Regional Office's decision, seeking an effective date based on his original benefits claim. *Id.* at 1362-63. As relevant here, the Board of Veterans Appeals analyzed this request under 38 C.F.R. § 3.156(c), which states that the VA will reconsider a prior claim "'if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim.'" *Id.* at 1363 (quoting 38 C.F.R. § 3.156(c)(1)). That same regulation states that "[a]n award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose

or the date VA received the previously decided claim, whichever is later." 38 C.F.R. § 3.156(c)(3).

The Board denied Kisor's request for reconsideration on the basis that the service department records submitted by Kisor in 2006 were not "'relevant'" within the meaning of the regulation. *Kisor*, 869 F.3d at 1364 (quoting Board decision). The Board stated that "'relevant evidence . . . would suggest or better yet establish that the Veteran has PTSD as a current disability.'" *Ibid.* (quoting Board decision). Kisor's records "were not 'outcome determinative' and 'not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat with the enemy during service.'" *Ibid.* (quoting Board decision).

Kisor appealed the Board's decision to the United States Court of Appeals for Veterans Claims. *Ibid.* The Veterans Court denied Kisor's appeal in a single-member, non-precedential decision. *Ibid.* *See* App. to Cert. Pet. 23a-25a (Veterans Court decision).

Kisor then appealed to the Federal Circuit, which has jurisdiction over decisions of the Veterans Court. *See* 38 U.S.C. § 7292. After considering both parties' arguments concerning the meaning of the dispositive regulation, the court of appeals ultimately concluded that "neither party's position strikes us as unreasonable." *Kisor*, 869 F.3d at 1366-68. On that basis, the court deferred to the Board's proffered interpretation of the regulation,[2] explaining that it did not find the Board's interpretation to be "'plainly erroneous or in-

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[2] "Because the Board is part of the VA," the court held that "the Board's interpretation of the regulation [was] deemed to be the agency's interpretation." *Id.* at 1367 n.10.

consistent' with the VA's regulatory framework." *Id.* at 1368 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007), quoting, in turn, *Seminole Rock*, 325 U.S. at 414). *See also id.* at 1367 (quoting *Auer*, 519 U.S. at 461, for same).

Kisor filed a petition for a writ of certiorari. The Court granted the writ limited to the following question: "Whether the Court should overrule *Auer* and *Seminole Rock*."

## SUMMARY OF ARGUMENT

Congress frequently delegates to administrative agencies authority to both promulgate rules interpreting a statute and to apply those rules in particular cases. The judiciary's role, in the first instance, is to ensure that the agency's rules represent a reasonable interpretation of the statute and, with regard to the agency's application of its rules in any subsequent case, to determine whether the agency's interpretation of its rules is reasonable.

When an agency exercises these congressionally-delegated powers through adjudication, judicial review is, without question, deferential. *See generally SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947). That is particularly the case when an agency, through its decisions, provides an initial, contemporaneous construction of the statute. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

It can hardly be doubted that similar deference is due where an agency engages in rulemaking and initially explains how the rule applies in common or otherwise foreseeable situations—*e.g.*, in the preamble to a regulation or in published agency guidance—or where an agency shows a record of consistently ap-

plying the same interpretation of its regulation in adjudications.

In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), this Court followed this approach, balancing the need for judicial oversight with appropriate deference to the agency's congressionally-delegated authority to engage in rulemaking and to apply its reasonable interpretations of those regulations in the course of enforcing them in specific cases.

*Auer v. Robbins*, 519 U.S. 452 (1997), purported to do no more than apply the approach to deference illustrated by *Seminole Rock*. However, *Auer*—which deferred to an interpretation that the agency acknowledged it had announced for the first time in its *amicus* brief to this Court—has come to stand for the indefensible proposition that an agency's interpretation of its regulations is virtually unreviewable.

This Court should reaffirm the carefully-bounded framework for judicial review of an agency's interpretation of its own regulations followed in *Seminole Rock*, while disavowing the strong form of deference *Auer* has come to represent.

Because the court of appeals in this case erred by extending deference to the VA's interpretation of its regulation where that interpretation had no basis in the text of the regulation, let alone in the agency's prior decisions or guidance, this Court should reverse and remand this case for further proceedings.

## ARGUMENT

Since its earliest decisions, this Court has recognized that an agency's consistent construction and application of its own rule can provide practical meaning to the text of the rule and, to that extent, be entitled

to deference. At the same time, this Court has established limits on when such judicial deference is warranted, thus maintaining the judiciary's proper role in making the ultimate determination of whether an agency's interpretation of its rule is correct.

Petitioner contends that extending deference in this manner allows the agency to informally "amend a rule that was promulgated through notice-and-comment procedures." Pet. Br. 36. "Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policy-making prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991). An interpretation that is consistent with the agency's past practice and adds nothing that could not have been included in the regulation in the first instance is, therefore, no "amend[ment of] a rule." Pet. Br. 36.

Where Congress has delegated to the agency "the power authoritatively to interpret its own regulations," *Martin*, 499 U.S. at 151, "judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme," *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). "Thus, while not abdicating their ultimate judicial responsibility to determine the law, *cf.* generally *SEC* v. *Chenery Corp.*, 318 U. S. 80, 92-94 (1943), judges ought to refrain from substituting their own interstitial lawmaking for that of the [agency]." *Ford Motor Credit*, 444 U.S. at 568.

This Court's decision in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), fully comports with this approach, exhibiting a practical and carefully-

bounded framework for determining when an agency's interpretation of its own regulation is entitled to deference that appropriately balances respect for the agency's congressionally-delegated authority to interpret its own regulations with the need for judicial oversight. On the approach followed by *Seminole Rock*, deference is appropriate when the agency has interpreted an ambiguous regulation consistently over time and thus provided notice to regulated parties of the regulation's meaning.

While the Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), purported to do no more than apply *Seminole Rock*, *Auer* has come to stand for the indefensible proposition that an agency's interpretation of its regulations is virtually unreviewable. The Court should reaffirm the framework set forth in *Seminole Rock*, while disavowing the strong form of deference *Auer* has come to represent.

In this case, the court of appeals erred by extending deference to the VA's interpretation of the pertinent regulation. In *Seminole Rock* terms, deference was not appropriate because the VA's interpretation had no basis in the agency's prior decisions or guidance and because regulated parties had no way of knowing, prior to this litigation, that the VA would interpret the regulation in the constricted manner it has advanced here.

1. *Seminole Rock* stands for the proposition that, in a case that "involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." 325 U.S. at 413-14. Where a regulation has been given a "consistent administrative interpretation" by the agency, that consistent interpretation should be afforded "con-

trolling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414, 418.

The roots of *Seminole Rock* run deep. As this Court long ago explained: "[O]f necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits." *United States v. Macdaniel*, 32 U.S. (7 Pet.) 1, 15 (1833). "Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions." *Ibid.* Deference is especially appropriate for a "construction . . . adopted by the departments . . . soon after the act . . . went into operation." *Surgett v. Lapice*, 49 U.S. (8 How.) 48, 68 (1850). In such a circumstance, this Court has stated, "we should feel ourselves restrained, unless the error of construction was plainly manifest, from disturbing the practice." *Ibid. See also Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.").

This doctrine of a "kind of common law" of administrative "usage," *Macdaniel*, 32 U.S. at 15, remained robust during the early days of the modern administrative state, when much administrative policy making was conducted through adjudication. In *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933), a tariff case, this Court explained:

> "[A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. The practice has peculiar

> weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Id.* at 315 (citations omitted).

"[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited"—*viz.* "the [agency]'s determination . . . is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 131 (1944). *See also id.* at 130-31 (explaining that "the judgement of those whose special duty is to administer the questioned statute" is entitled to "appropriate weight" (citing *Norwegian Nitrogen*, *supra*)). It matters not whether "the reviewing court might have made a different determination were it empowered to do so." *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 94 (1943). The Court will uphold an agency decision so long as "the [agency] has made a thorough examination of the problem, utilizing statutory standards and its own accumulated experience," *i.e.*, "has made . . . an informed, expert judgment on the problem." *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 207 (1947).

It was against this doctrinal background that *Seminole Rock* was decided. Because that case so aptly illustrates the traditional approach to judicial review of an agency's interpretation of its own regulations, it is worth describing in detail.

*Seminole Rock* involved the Administrator of the Office of Price Administration's interpretation of Maximum Price Regulation No. 188, promulgated pursuant to the Emergency Price Control Act of 1942. 325

U.S. at 411. "The core of the regulation was the requirement that each seller shall charge no more than the prices which he charged during the selected base period of March 1 to 31, 1942." *Id.* at 413. Seminole Rock & Sand Company entered into a contract in October 1941 to provide crushed stone to a customer for 60 cents per ton, but did not deliver the stone until March 1942. *Id.* at 412. When Seminole Rock later agreed to sell stone to additional customers at higher rates, the Administrator brought an action to enjoin the sales on the ground that they exceeded the 60 cents per ton maximum established by operation of the Maximum Price Regulation, a conclusion Seminole disputed. *Id.* at 412-13.

The regulation stated that the "'Highest price charged during March, 1942' means":

> "(i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942; or
>
> (ii) If the seller made no such delivery during March, 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or
>
> (iii) If the seller made no such delivery and had no such offering price to a purchaser of the same class during March, 1942, the highest price charged by the seller during March, 1942, to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers . . ." *Id.* at 414-15 (quoting Maximum Price Regulation No. 188, § 1499.163(a)(2)).

The dispute, as described by the Court, "centers about the meaning and applicability of rule (i)." *Id.* at 415. "The Administrator claims that the rule is satis-

fied and therefore is controlling whenever there has been an actual delivery of articles in the month of March, 1942, such as occurred when respondent delivered the crushed rock . . . at the 60-cent rate." *Ibid.* "[Seminole Rock], on the other hand, argues that there must be both a charge and a delivery during March, 1942, in order to fix the ceiling price according to rule (i)." *Ibid.*

The Court began by noting that, "[a]s we read the regulation, . . . rule (i) clearly applies to the facts of this case." *Ibid.* "Whatever may be the variety of meanings, . . . rule (i) adopts the highest price which the seller 'charged . . . for delivery' of an article during March, 1942." *Id.* at 415-16 (second alteration in *Seminole Rock*) (quoting Maximum Price Regulation No. 188, § 1499.163(a)(2)). On the plain language of the regulation, then, "[t]he essential element bringing the rule into operation is thus the fact of delivery during March." *Id.* at 416.

The Court then noted that this interpretation was "further borne out by" the regulatory scheme taken as a whole. *Ibid.* "[R]ule (ii) becomes applicable only where 'the seller made no such delivery during March, 1942,' as contemplated by rule (i)." *Ibid.* (quoting Maximum Price Regulation No. 188, § 1499.163(a)(2)). And, a different section of the Maximum Price Regulation "defines the word 'delivered' as meaning 'received by the purchaser or by any carrier . . . for shipment to the purchaser' during March, 1942." *Ibid.* (quoting General Maximum Price Regulation, § 1499.20(d)).

Finally, the Court stated that "[a]ny doubts concerning this interpretation of rule (i) are removed by reference to the administrative construction of this method of computing the ceiling price." *Id.* at 417. "[I]n a bulletin issued by the Administrator concur-

rently with the General Maximum Price Regulation . . . , which was made available to manufacturers as well as to wholesalers and retailers, the Administrator stated []: 'The highest price charged during March 1942 means the highest price which the retailer charged for an article actually delivered during that month or, if he did not make any delivery of that article during March, then his highest offering price for delivery of that article during March." *Ibid.* (emphasis and footnote omitted). The bulletin also stated that, "It should be carefully noted that actual delivery during March, rather than the making of a sale during March, is controlling." *Ibid.* (emphasis omitted). And, the Court noted that the position set forth in the bulletin "has uniformly been taken by the Office of Price Administration in the countless explanations and interpretations given to inquirers affected by this type of maximum price determination." *Id.* at 417-18.

*Seminole Rock* provides a practical and carefully-bounded framework for determining when deference to an agency's interpretation of its regulation is appropriate. The question only arises "if the meaning of the words used [in the regulation] is in doubt." *Id.* at 414. Deference is then appropriate if the agency's construction of the regulation is "[]consistent with the regulation," *ibid.*, and comports either with a "consistent administrative interpretation of the [relevant] phrase," *id.* at 418 (footnote omitted), or, if the regulation is new, guidance "issued by the [agency] concurrently with the . . . [r]egulation," *id.* at 417, based on "a thorough examination of the problem, utilizing statutory standards and [the agency's] own accumulated experience," *Chenery II*, 332 U.S. at 207.

By contrast, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier in-

terpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). An important reason for this rule concerns "the adequacy of notice to regulated parties." *Martin*, 499 U.S. at 158. *Cf.* 1 R. Pierce, Administrative Law Treatise § 6.11, p. 543 (5th ed. 2010) ("In penalty cases, courts will not accord substantial deference to an agency's interpretation of an ambiguous rule in circumstances where the rule did not place the individual or firm on notice that the conduct at issue constituted a violation of a rule."). Surprise, of course, can be avoided if the agency makes a clear public announcement of its interpretation. *See, e.g.*, *Seminole Rock*, 325 U.S. at 417 (describing the agency's "What Every Retailer Should Know About the General Maximum Price Regulation" bulletin); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 384 (1969) (describing "the FCC's 1949 Report on Editorializing, which the FCC views as the principal summary of its *ratio decidendi* in cases in this area"). Or, if the agency announces its new interpretation in an adjudication or other fact-based determination, it can decide to apply that interpretation prospectively only. *See Epilepsy Found. of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) ("[W]hen there is a substitution of new law for old law that was reasonably clear, the new rule may justifiably be given prospectively-only effect in order to protect the settled expectations of those who had relied on the preexisting rule." (Citation and internal quotation marks omitted)).

Another rationale for denying deference to an agency's changed interpretation of a regulation—especially if it first appears in the context of litigation—is to ensure that the agency has exercised its "informed, expert judgment on the problem," *Chenery II*, 332 U.S.

at 207, and is not simply engaged in "*post hoc* rationalizations for agency action," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). For that reason, a Court may require a more thoroughgoing explanation for a changed interpretation of a regulation than for an interpretation that simply continues longstanding policy. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

In light of the carefully-bounded approach described above, it is no surprise that, in the decades that followed, this Court regularly applied *Seminole Rock* in a wide range of settings, and without significant controversy. Notably, this Court did so both to extend deference where it was warranted, *see, e.g.*, *Udall v. Tallman*, 380 U.S. 1, 4, 16-18 (1965) (Secretary of Interior interpretation of regulation regarding issuance of oil and gas leases on public land); *INS v. Stanisic*, 395 U.S. 62, 72 (1969) (INS interpretation of regulation concerning hearings for alien crewman); *Ehlert v. United States*, 402 U.S. 99, 105 (1971) (Selective Service interpretation of regulation concerning timing of conscientious objection claims); *N. Ind. Pub. Serv. Co. v. Porter Cty. Chapter of Izaak Walton League, Inc.*, 423 U.S. 12, 14-15 (1975) (Atomic Energy Commission interpretation of regulation concerning location of nuclear plants); *United States v. Larionoff*, 431 U.S. 864, 872-73 (1977) (Navy's interpretation of Department of Defense regulation pertaining to reenlistment bonuses), as well as to deny deference when the *Seminole Rock* standard was not met, *see, e.g.*, *Watt*, 451 U.S. at 272-73 (new Department of Interior interpretation conflicting with prior interpretation that was issued contemporaneously with regulation not entitled to deference); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 538 n.29 (1982) (no deference for Department of Education's interpretation of its regulation where

"that interpretation has fluctuated from case to case"). The common thread in these cases, following *Seminole Rock* itself, was that deference will apply only where the pertinent regulation contains "ambiguous terms," the agency's "interpretation is not plainly inconsistent with the wording of the regulations," and, "throughout the period in which the [relevant] program was in effect, the [agency] interpreted the . . . regulations" consistently. *Larionoff*, 431 U.S. at 872-73.

2. *Auer v. Robbins*, 519 U.S. 452 (1997), displays a significantly less-bounded approach to deference to an agency's interpretation of its own regulations than *Seminole Rock*. As a result, *Auer* came to stand for the proposition that an agency's interpretation of its own regulation is virtually unreviewable. In response, some agencies sought deference for their interpretations of regulations in circumstances that would not have qualified for deference under *Seminole Rock*. This Court then cut back on *Auer*, and, in addition, some members of this Court began to question the entire enterprise of extending judicial deference to agency interpretation of regulations. *See, e.g., Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment) ("I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument."); *id.* at 1213 (Scalia, J., concurring in the judgment) ("I would . . . abandon[] *Auer* . . . ."); *id.* at 1225 (Thomas, J., concurring in the judgment) ("[T]he entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case."). *But see id.* at 1208-09 & n.4 (Sotomayor, J., opinion for the Court) (generally approving of extending deference to agency interpretations of their own regulations, while making clear that "*Auer* deference is not an inexorable command in all cases").

*Auer* itself is flawed, as we explain below, but not for any reason that provides a basis for overruling *Seminole Rock*. To the contrary, as we have demonstrated, the *Seminole Rock* framework constitutes a practical and bounded approach to judicial review of agency interpretation of regulations that recognizes that those "charged with the responsibility of setting [the agency's] machinery in motion," *Norwegian Nitrogen*, 288 U.S. at 315, are frequently best-positioned to provide authoritative interpretations of the regulations they enforce, while also requiring clear indicia that the agency actually "has made . . . an informed, expert judgment on the problem," *Chenery II*, 332 U.S. at 207, before judicial deference is extended. The Court should thus reaffirm the approach set forth in *Seminole Rock* and discard the strong form of deference represented by *Auer*.

*Auer*, which involved two private parties, concerned, *inter alia*, dueling interpretations of the Secretary of Labor's "salary-basis" test regulation implementing the Fair Labor Standards Act's exemption from overtime requirements for "bona fide executive, administrative, or professional" employees. 519 U.S. at 454-55 (quoting 29 U.S.C. § 213(a)(1)). The United States filed an *amicus* brief on behalf of the Secretary of Labor supporting the respondent employer's interpretation of the regulation. Citing *Seminole Rock* and its "plainly erroneous or inconsistent with the regulation" standard, the Court deferred to the Secretary's position, noting that the Secretary's interpretation of "[t]he critical phrase [of the regulation] comfortably bears the meaning the Secretary assigns." *Id.* at 461. The Court did not, however, reference any prior opinions or interpretations by the Secretary that supported this interpretation. Rather, the Court cited only to two dictionaries containing similar definitions of the

relevant regulatory phrase, and extolled the fact that "[t]he Secretary's approach rejects a wooden requirement" and "avoids the imposition of massive and unanticipated overtime liability." *Ibid.*

It is notable, in this regard, that neither the respondent employer nor the United States sought *Seminole Rock* deference for the Secretary of Labor's views.[3] *See* Respondents Brief on the Merits at 27-28 & n.12, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 95-897); Brief for the United States as Amicus Curiae Supporting Affirmance at 21-24, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 95-897). Instead, the employer sought only *Skidmore* deference for the Secretary's "body of experience and informed judgment" as expressed in the *amicus* brief. Respondents Brief on the Merits at 28 n.12 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The United States sought no deference at all for the Secretary's views. That is presumably because, as the United States explained in its brief filed at the *certiorari* stage—in which it set forth the same merits argument while urging the Court not to take the case—"the cases upon which petitioners rely [to show a circuit split] were all decided *without the benefit of a clear statement* by the Department of Labor on the correct reading of its regulations." Brief for the United States as Amicus Curiae at 14 (emphasis added). Citing *Seminole Rock*, the government then asserted that, "[a]ccordingly, *in future cases*, the courts of appeals will be guided by the Secretary's interpre-

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[3] The employer was aware of the Secretary of Labor's position at the time it filed its merits brief because, as we explain in the text, the United States had previously filed a brief at the *certiorari* stage in which it set forth the Secretary's view on the merits. *See* Brief for the United States as Amicus Curiae at 8-11, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 95-897).

tation in construing the applicable regulations." *Id.* at 15 (emphasis added). Yet, despite the frank acknowledgment by the United States that there was no clear prior statement of the Secretary of Labor's position on the dispositive interpretive issue, this Court summarily dismissed the petitioners' complaint that the Secretary's interpretation was not worthy of deference. *See Auer*, 519 U.S. at 462 ("There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.").

The problem, in *Seminole Rock* terms, was that there was no reliable indicia that the Secretary's interpretation as set forth in the *amicus* brief reflected the agency's fair and considered judgment. For example, there was neither evidence of a "consistent administrative interpretation" of the relevant phrase of the regulation, 325 U.S. at 418, nor any pre-litigation publication of the agency's views—akin to the Maximum Price Regulation bulletin in *Seminole Rock*—that would ensure both that regulated parties had notice of the agency's interpretation and that the view expressed by the agency in litigation was the result of "a thorough examination of the problem, utilizing statutory standards and [the agency's] own accumulated experience with [such] matters," *Chenery II*, 332 U.S. at 207. By extending "controlling weight," *Seminole Rock*, 325 U.S. at 414, to the Secretary's interpretation in this circumstance, *Auer* appeared to signal a loosening of this Court's standards for when it is appropriate to afford deference to an agency's interpretation of its own regulation.

Intentional or not, that signal was received by agencies. Their aggressive assertion of *Auer* deference in subsequent cases led to a series of decisions in which this Court imposed limits on the seemingly sweeping

assertion of the doctrine in *Auer*. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006) (*Auer* does not apply "when, instead of using its expertise and experience to formulate a regulation, [the agency] has elected merely to paraphrase the statutory language"); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 154-56 (2012) (*Auer* deference inappropriate where agency "changed course after we granted certiorari in this case," because "it would result in precisely the kind of unfair surprise against which our cases have long warned" (internal quotation marks omitted)).

To be sure, the specific concerns expressed by the Court in these post-*Auer* cases are valid. Importantly, however, they are all concerns addressed by *Seminole Rock*. *Seminole Rock* makes clear that "a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt," 325 U.S. at 414, *i.e.*, "deference is warranted only when the language of the regulation is ambiguous," *Christensen*, 529 U.S. at 588. *Seminole Rock* also makes clear that "merely . . . paraphras[ing] the statutory language," "instead of [the agency] using its expertise and experience to formulate a regulation," *Gonzales*, 546 U.S. at 257, is insufficient. In order to earn deference under *Seminole Rock*, the agency must provide an affirmative "administrative construction" that provides regulated parties with clear notice of the agency's interpretation of the regulation and that construction must be "consistent." 325 U.S. at 417-18. For the same reasons, nothing in *Seminole Rock* suggests that an agency may receive deference when it "change[s] course" in its interpretation without notice to regulated parties, since such an approach "would

result in . . . unfair surprise." *Christopher*, 567 U.S. at 154-56 (internal quotation marks omitted).

There is, in sum, no reason to overrule *Seminole Rock*. Rather, this Court should reaffirm the practical and carefully-bounded *Seminole Rock* framework for judicial review of agency interpretations of regulations, while making clear the ways in which *Auer* strayed from that approach.

3. In this case, deference to the agency's interpretation of its regulation under *Seminole Rock* is clearly not appropriate. The Court should thus reverse and remand the case to the court of appeals for further consideration.

The Federal Circuit has "'exclusive jurisdiction to review and decide any challenge to the validity of any . . . regulation or any interpretation thereof'" by the Veterans Court. *Kisor*, 869 F.3d at 1365 (alteration in original) (quoting 38 U.S.C. § 7292(c)). The Court "must set aside an interpretation of a regulation that [is] . . . 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Ibid.* (quoting 38 U.S.C. § 7292(d)(1)(A)).

As the Federal Circuit explained, "[a]t the heart of this appeal is Mr. Kisor's challenge to the VA's interpretation of the term 'relevant' in 38 C.F.R. § 3.156(c)(1)." *Id.* at 1367. The court affirmed the Veterans Court's decision denying Kisor's request for reconsideration on the grounds that: (a) "[t]he Board interpreted 38 C.F.R. § 3.156(c)(1) when it ruled that Mr. Kisor's service department records were not 'relevant' under that subsection"; (b) "[b]ecause the Board is part of the VA, the Board's interpretation of the regulation is deemed to be the agency's interpretation"; and (c) therefore, "we defer to an agency's interpreta-

tion of its own regulation" pursuant to *Seminole Rock* and *Auer*. *Id.* at 1367 & n.10 (citations omitted).

The court of appeals' basis for extending deference to the Board's interpretation of the term "relevant" in § 3.156(c)(1) does not come close to meeting the criteria set forth in *Seminole Rock*. Most notably, there is nothing here to defer to except the Board's bare interpretation of that term as applied to the specific facts of this case. The Board did not cite to any decision of the Board or of the Veterans Court for its interpretation, much less to any VA guidance explaining the meaning of the regulatory term. The Secretary, in defending the Board's decision, merely "collect[ed] various competing definitions from case law, legal dictionaries, and legal treatises." *Id.* at 1368. In short, nothing in this case suggests that the VA's view is entitled to the "controlling weight" that a "consistent administrative interpretation" merits under *Seminole Rock*. 325 U.S. at 414, 418.

On the merits, Kisor raises a substantial argument that the Board's decision interpreting the regulatory term "relevant" to mean evidence that is "outcome determinative" or would "establish" a claim was arbitrary and capricious.

First, as a matter of common English usage, "'whether or not the Veteran engaged in combat with the enemy during service'" is *relevant* to whether "'a diagnosis of PTSD was . . . warranted.'" *Kisor*, 869 F.3d at 1364 (quoting Board decision). Whether the service records the VA failed to consider would have affected the VA's decision in 1983 that Kisor did not have PTSD is a fact-based question the agency should have decided after granting reconsideration, rather than stretching the meaning of the regulatory term

"relevant" to cover only those records that *necessarily* would have changed the fact-finder's decision.

Notably, the VA's amendment to, and contemporaneous explanation of, the regulation at issue in this case fully accords with this common sense understanding.

In promulgating the current version of 38 C.F.R. § 3.156(c), the VA removed a prior "new and material" requirement that had been in an earlier version of the regulation. New and Material Evidence, 70 Fed. Reg. 35,388, 35,388 (proposed June 20, 2005). *See Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014) ("In contrast to the general rule, § 3.156(c) requires the VA to reconsider a veteran's claim when relevant service department records are newly associated with the veteran's claims file, whether or not they are 'new and material' under § 3.156(a)," which "only permits claims to be reopened"). It would thus be odd to interpret the regulatory term "relevant" as setting a higher evidentiary bar than the deleted term "material"—*e.g.*, as applying only to evidence that is "outcome determinative" or would "establish" a claim, *Kisor*, 869 F.3d at 1364 (quoting Board decision)—as the Board did in this case.

Moreover, paragraph (4) of 38 C.F.R. § 3.156(c), which neither the Board, nor the Veterans Court, nor the court below considered, expressly contemplates the possibility of "[a] retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department," explaining that "[w]here such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly." 38 C.F.R. § 3.156(c)(4). The court of appeals' conclu-

sion that "Mr. Kisor's personnel records submitted in 2006 are not probative here because they do not purport to remedy the defects of his 1982 PTSD claim," *Kisor*, 869 F.3d at 1368, fails to take into account the regulation's allowance for a "retroactive evaluation of disability . . . on the basis of the new evidence from the service department." 38 C.F.R. § 3.156(c)(4).

That common sense understanding of the regulatory term "relevant" described above is buttressed by the VA's explanation in the preamble to the current regulation, which explained: "We intend that this broad description of 'service department records' will also include unit records, such as those obtained from the Center for Research of Unit Records (CRUR) that pertain to military experiences claimed by a veteran. Such evidence may be particularly valuable in connection with claims for benefits for post traumatic stress disorder." 70 Fed. Reg. at 35,388. The purpose of this rule was to "allow VA to reconsider decisions and retroactively evaluate disability in a fair manner, on the basis that a claimant should not be harmed by an administrative deficiency of the government . . . ." 70 Fed. Reg. at 35,389. *See also Blubaugh*, 773 F.3d at 1313 ("§ 3.156(c) serves to place a veteran in the position he would have been had the VA considered the relevant service department record before the disposition of his earlier claim." (citing 70 Fed. Reg. at 35,388-89)). That is precisely Kisor's argument here—that he be allowed the "retroactive[] evaluat[ion of his] disability in a fair manner, on the basis that [he] should not be harmed by an administrative deficiency of the government." 70 Fed. Reg. at 35,389.

Finally, as a factual matter, the VA *did* rely on "official service department records that existed and had not been associated with the claims file when VA first

decided the claim," 38 C.F.R. § 3.156(c)(1), in reversing its earlier decision that Kisor did not have PTSD and in deciding that he is now entitled to benefits. The VA Regional Office's decision explained straightforwardly that: "Since VA examination shows that you have been diagnosed with posttraumatic stress disorder due to your experiences that occurred in Vietnam and your service administrative records show that you are a combat veteran (Combat Action Ribbon recipient), service connection for posttraumatic stress disorder has been established as directly related to military service." J.A. 42. Because the VA relied on "official service department records that existed and had not been associated with the claims file," 38 C.F.R. § 3.156(c)(1), in reaching the decision to reverse itself, *a fortiori*, those records were "relevant" to the new determination.

## CONCLUSION

The Court should decline to overrule *Seminole Rock*. Rather, the Court should hold that the VA is not entitled to deference under *Seminole Rock* and, therefore, should reverse the court of appeals and remand this case for a decision that does not rely on *Seminole Rock* deference.

Respectfully submitted,

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